MAR 8 2001 (10)

Supreme Court
FILED
MAR 8 2001
CLERK

No. 00-276

IN THE

Supreme Court of the United States

UNITED STATES
and DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Freedom (the Center) is a non-profit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center are constitutional protections for the freedom of speech, including each citizen's freedom from viewpoint-based compulsion to support the speech of others.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. There is a fundamental First Amendment equivalence between the compulsion of speech and the restriction of speech. Because both use coercion to manipulate public debate and public opinion, both are subject to comparable First Amendment scrutiny.

2. Compelled support for third-party speech must be subjected to First Amendment scrutiny comparable to the scrutiny applied to restrictions on voluntary support for similar speech. The "germaneness" analysis developed in connection with compelled support for the mixed speech and conduct of labor unions is best understood as the corollary of the analysis regarding restrictions on speech that is mixed with conduct. In mixed speech and conduct cases, a burden on speech may be permissible if it is incidental to the valid regulation of conduct closely bound up with the burdened speech. Likewise, compelled support for speech must, at a minimum, arise from validly compelled support for conduct that is closely bound up with speech and such speech must not go beyond that necessary for the primary conduct.

The compelled advertising in this case fails that test because it is not incidental to and necessary for the accomplishment of some compelled primary conduct such as collective bargaining or collective sales. Any new rule allowing stand-alone compulsion of speech would dramatically erode core First Amendment principles distinguishing the regulation of speech from the regulation of conduct. If the First Amendment stands for anything, it stands for the propositions that *speech is different* and that the regulation of speech is more burdensome to liberty than regulation of conduct.

3. The so-called government speech doctrine cannot save the speech compulsion in this case. This Court should decline the government's invitation to rule on a new defense neither raised nor litigated in the courts below. The scope and permissibility of government advocacy directed at its own citi-

zens – in short, domestic propaganda – is a complex issue that has never been addressed in this Court except by *dicta* or non-controlling opinions. This is not an appropriate case through which to enter into that briar patch, foreclosing many future avenues of analysis by the lower courts in subsequent cases. Furthermore, contrary to some past *dicta*, domestic propaganda, whether political or economic, raises a significant First Amendment issue. Precisely because speech is different than conduct, using the coerced resources of government to manipulate public opinion and desire poses a much greater threat than does regulating public behavior alone. The test for government advocacy aimed at its own citizens thus should be the same as the test for compelled support for third-party speech.

ARGUMENT

The Sixth Circuit held that compelled support for generic advertising of mushrooms violated the First Amendment because it "is not 'germane' to any collective program" regarding mushrooms, regardless whether such advertising is viewed as non-ideological or nonpolitical in nature. Pet. 7a. That holding was correct. And both that result and the appropriate First Amendment test should remain the same even if this Court were to view this case as involving the government's own speech.

I. THE EQUIVALENCE OF COMPULSION AND RESTRICTION REGARDING THE FREEDOM OF SPEECH AND EXPRESSIVE ASSOCIATION.

It is a central First Amendment principle that the "freedom of speech" includes the complementary freedoms from both the restriction and compulsion of expression. As this Court recognized in *Riley* v. *National Feder'ation of the Blind*, while "[t]here is certainly some difference between compelled speech and compelled silence, * * * in the context of protected speech, *the difference is without constitutional*

significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." 487 U.S. 781, 796-97 (1988) (emphasis added). In *Abood* v. *Detroit Board of Education*, this Court likewise recognized such First Amendment equivalence as to monetary contributions in support of expression, holding that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. 209, 234 (1977).

The fundamental objection to government regulation of speech – whether by prohibition or by compulsion – is that it coercively manipulates public opinion:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion.*

Turner Broadcasting Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994) (emphasis added). Such government manipulation is constitutionally objectionable because at "the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Id.* at 641. While the government certainly has the authority to take numerous *actions* based upon prevailing points of view, such authority does not extend to manipulating public opinion. Rather, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 641 (1943).

The concern that public opinion – the "public mind" – remain free from manipulation by the government retains

force regardless of whether such manipulation is attempted by restriction or compulsion of speech:

> The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. * * * "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.

Riley, 487 U.S. at 790-91. Tilting the playing field of ideas, whether through compelled subtraction or compelled addition of particular viewpoints, necessarily clashes with the First Amendment. There is little constitutional difference between the government placing its thumb on the scale via a viewpoint-discriminatory, though moderate, burden on disfavored speech or via a viewpoint-discriminatory benefit amplifying the voice of the favored side of a debate. In both instances the debate continues, but it does so on the government's terms and under the government's direction.[2]

Amicus suggests that compulsion and restriction should be analyzed in *pari materia*: Whatever First Amendment scru-

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[2] Even absent complete suppression of particular views, the First Amendment is offended by efforts to skew public debate. See, e.g., *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978) (where speech restriction "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted); *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

tiny is appropriate to a given restriction of speech should apply to the compulsion of like speech.

II. CONGRESS MAY NOT COMPEL SUPPORT FOR SPEECH THAT IS NOT INTEGRAL TO OTHERWISE PERMISSIBLE COMPELLED CONDUCT.

The government incorrectly claims that persons may be compelled to support even the ideological expressive activities of an organization "provided that the activities are 'germane' to a sufficiently important legislative purpose justifying the compelled association" with the organization. Pet. Br. 16. The government then defines the relevant "purposes" as merely the hoped-for end results or benefits motivating the Mushroom Act: maintaining and expanding demand for mushrooms and generally benefiting producers, processors, and the agricultural economy as a whole. *Id.* at 25. But the "germaneness" test requires far more than mere circular relation between a speech compulsion and the motivation for its imposition. Instead, a speech compulsion must be "germane" not to itself, but rather to the accomplishment of *some other action* that Congress has properly required. In this case, the stand-alone speech compulsion serves only itself, does not serve to implement other conduct that Congress has required, and thus violates the First Amendment.[3]

A. Compelled Speech Is "Germane" Only When It Is Required to Engage in Conduct Otherwise Properly Compelled.

The "germaneness" test was developed in the context of compelled contributions to labor unions and integrated bar associations. See *Abood*, 431 U.S. at 236 (contributions may

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[3] *Amicus* also disagrees with the government's claim that compelled speech is allowed where it is either "germane" *or* non-ideological. Pet. Br. 16-17 n.9. *Amicus* will leave that issue to others, however, and focus primarily on the substance of the "germaneness" requirement.

be compelled for "collective-bargaining activities," but "such compulsion is prohibited" for "ideological activities unrelated to collective bargaining"); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 16 (1990) ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."). In *Lehnert* v. *Ferris Faculty Association*, the applicable standards for the use of compelled contributions in the union context were summarized as follows:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991). That description identifies the germaneness inquiry as relating to specific conduct and as separate from the government's "policy interest" or motive in adopting the legislative scheme in the first instance.

In its recent opinion in *Board of Regents of the University of Wisconsin System* v. *Southworth*, however, this Court recognized that even in the more familiar context of labor unions, it has "encountered difficulties in deciding what is germane and what is not." 529 U.S. 217, 232 (2000); see also *Keller*, 496 U.S. at 15 ("Precisely where the line falls * * * will not always be easy to discern. But the extreme ends of the spectrum are clear"). *Amicus* suggests that it would be appropriate to clarify that test and confirm that the germaneness of compelled support for speech must be measured against some underlying compelled conduct that cannot be accomplished without a certain amount of speech incidental to that conduct. That clarification of the germaneness test is consistent with the *Abood* line and with First Amendment ju-

risprudence relating to restrictions on mixed speech and conduct.

Over the long line of labor cases, this Court has identified specific economic conduct – negotiation and implementation of collective bargaining agreements – as both the permissible purpose of compelled support and the relevant *object* of the germaneness analysis. Thus, in *Railway Employees' Department* v. *Hanson*, this Court held that compelled "financial support of the collective-bargaining agency" does not violate the First Amendment but noted that "a different problem would be presented if the assessments were "imposed for purposes not germane to collective bargaining." 351 U.S. 225, 236, 238 (1956). In *Abood*, this Court followed *Hanson* "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. But this Court agreed with appellants there that a union could not, over objection, spend compelled service fees on speech "unrelated to its duties as exclusive bargaining representative." *Id.* at 234. And where the relation between particular speech and the "process of establishing a written collective-bargaining agreement" was uncertain, the Court suggested that the relevant inquiry would be whether the context of the speech "*might be seen as an integral part of the bargaining process*." *Id.* at 236 (emphasis added); cf. *Ellis* v. *Railway Clerks*, 446 U.S. 435, 448 (1984) ("the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues").[4]

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[4] While the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation

By contrast, speech regarded as non-germane was not integral to the primary conduct being compelled. While such speech may have been relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct itself and thus was analyzed distinctly from such conduct. For example, in *Lehnert* this Court held that generic promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

500 U.S. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct – collective contract negotiation and administration – being compelled in the first place.

This construction of the germaneness test is consistent with, and in effect the compulsion flip-side of, this Court's cases involving restrictions on mixed speech and conduct. For example, in *United States* v. *O'Brien* the law forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. 391 U.S. 367, 376 (1968). The law in *O'Brien* was upheld where the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than is essential" to accomplishing

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without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id* at 377. In like manner, the germaneness test allows some burden on speech arising from compelled support of conduct where the speech burden is incidental and no greater than essential to achieve the otherwise properly compelled conduct. And finally, as in *O'Brien*, the purposes and effect of government-compelled contributions must be imposed for the "noncommunicative impact of [the supported] conduct, *and for nothing else*." *Id*. at 382; see also *id*. at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct").

As clarified and read in light of cases such as *O'Brien*, the germaneness test is an appropriate means of addressing the problem of compelled support for mixed speech and conduct. It is also a test that the government fails in this case.

B. Compelled Mushroom Advertising Is Not Integrally Tied to Compelled Conduct.

The government's primary dodge on the germaneness test is to misidentify the *object* of the test: that to which the speech compulsion must be "germane." Instead of the speech having to be germane to particular compelled conduct, the government claims the compulsion need only be germane to a government "purpose," defined at the highest possible level of generality as its "goal" or the "benefits" it hopes to achieve. See Pet. Br. 18 (Mushroom ads "germane to the statutory purposes" of expanding and developing markets for mushrooms). But that test is meaningless, and would fully eviscerate the germaneness requirement. Indeed, the compelled support for teacher promotional advertising rejected in *Lehnert* would satisfy the empty test proposed by the government, but eight members of the Court rejected such involuntary use of mandatory fees. The better test is that the speech must be tied to and in the service of some conduct that

is the primary object of compelled support or collective activity. In this case there is no joint conduct such as collective bargaining to which the mushroom ads are integrally related and hence "germane."[5]

The government counters that the mere existence of substantive regulation of a commodity has no bearing on the permissibility of compelled advertising because the "government's purpose for adopting a generic advertising program – to stimulate sales of a commodity – is equally valid regardless of" any other regulation of a commodity. Pet. Br. 12. But even if the same government "purpose" were thought to persist regardless of other regulation, it is only the *relationship* between such other regulation and the speech being compelled that serves to insulate incidental speech compulsions from the rigorous scrutiny applied to pure regulation of speech. That the government may have a "valid" purpose tells us nothing when that purpose is described at a sufficiently high level of generality, and it is beside the point in any event. Virtually any censor could describe their purpose with sufficient abstraction to render it "legitimate" in the sense that it would support government action in the non-speech arena under the rational basis test. But the First Amendment demands more. It is not the purpose, but the

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[5] It would be a different – though not necessarily constitutional – situation if the marketing order also compelled the collective sale of all mushrooms through the Mushroom Council. Under such circumstances, advertising by the Council, and compelled support of such advertising, might be considered integrally related to the sale of mushrooms *by the Mushroom Council itself*, and would be germane in the *Abood* sense to the compelled *conduct* of collective sales of mushrooms. It would also be a different case if the marketing order gave credit for the separate advertising of the growers, thus allowing for choice in content and viewpoint while still providing a mechanism for cooperation among those with similar perspectives. Such a viewpoint neutral approach avoids free-riders by effectively requiring that everybody do their fair share to build the mushroom market, and would relate directly to the grower's *own* sales of the mushrooms, unlike generic ads by an entity not itself selling the commodity.

"means" of accomplishing that purpose that is most often the subject of dispute in a First Amendment case, and this case is no different. Cf. *Riley*, 487 U.S. at 791 (even "purest of motives" do not allow government to "substitute its judgment as to how best to speak for that of speakers").[6]

The claim that "'the advertising tool merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," Pet. Br. 22-23 (citation omitted), displays a gross misunderstanding of the relative offensiveness of different types of government conduct. The First Amendment establishes that speech regulation is, by definition, more invasive in a constitutional sense than are other forms of regulation entitled to presumptions of validity under rational basis review. As this Court noted in *Barnette*:

> The right of a State to regulate, for example, a public utility may well include * * * all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.*

319 U.S. at 639 (emphasis added). That mere rationality is sufficient to regulate conduct but not speech simply highlights the point that *speech is different.*

The position taken by the government is reminiscent of the now-repudiated argument in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico* that the power to ban conduct, even when unexercised, includes the supposedly "lesser" power to regulate speech concerning such conduct. 478 U.S. 328, 345-46 (1986). This Court has emphatically rejected that contention, holding that it is "well settled

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[6] Indeed, the First Amendment forbids government action that is presumed to be valid under the government's enumerated powers, for if it were beyond the government's powers to begin with, there would be no need to reach the First Amendment question at all.

that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 193 (1999); *see also 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 510 (1996) (principal opinion) (rejecting contention "premised entirely on the 'greater-includes-the-lesser' reasoning endorsed toward the end of the majority's opinion in *Posadas*."). "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society." *Id.* at 512.

The government makes the related argument that Congress might well prefer to achieve its goals through speech regulation in order to avoid the adverse consequences of "antagoniz[ing]" our trading partners or domestic consumers by direct efforts to support domestic producers and to prop up commodity prices. Pet. Br. 26 n.14. While the speech regulation in this case might well achieve the desired results and yet slip under the radar screens of those adversely affected, that is precisely why the regulation of speech is more offensive to the Constitution than is the regulation of conduct.

By manipulating public opinion, speech regulation is a much more insidious, intrusive, and effective means of controlling behavior than is the direct application of government fiat to individual conduct. *See 44 Liquormart,* 517 U.S. at 509-10 (principal opinion) (discussing *Posadas*: Puerto Rico's "advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw").[7] While Congress may

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[7] Where people are free to think and speak, government regulation of conduct will be recognized for what it is, and accepted or opposed according to the strength of the arguments for and against the regulation. But where government tries to achieve the same regulatory result by altering the in-

well desire to avoid the political consequences of its programs and to hide their true costs, the First Amendment stands as a sound and sensible barrier to such political deception.

The notion that the benefits of the speech alone are sufficient to trigger the free-rider justification of the *Abood* line of cases, Pet. Br. 12, 30, independent of any group benefits from other substantive regulation, is mistaken and repugnant to the First Amendment. If the supposed benefits of the forced speech alone are sufficient to justify compelled collective speech, then there is nothing that would fail to satisfy that test. In any instance where the government elects to force speech at all, it plainly believes there is some benefit to that speech, and under the rational basis test proposed by the government, courts would rarely be in a position to say otherwise. But while "private speech often furthers the interests of nonspeakers," the existence of such positive externalities "does not alone empower the state to compel the speech to be paid for." *Lehnert*, 501 U.S. at 556 (Scalia, J., concurring in the judgment and dissenting in part).

C. *Wileman* Is Not Inconsistent with Rigorous Application of the Germaneness Test.

This Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), sensibly understood, is quite compatible with the above analysis of the germaneness test. Although some language from the late-June *Wileman* opinion might be misread to signal a sharp departure from core principles of decades-old jurisprudence, the better view of the opinion is to consider its overall context and to resist imputing to the majority such an unlikely purpose.

Taking the latter approach, there are two recurring points in the *Wileman* opinion that seem significant. First, the Court

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formation flow and hence altering the way people think about an issue to begin with, there is less chance that the government's coercion will be seen for what it is.

"stress[ed] the importance of the statutory context" in addressing the First Amendment question and determined, accurately or not, that California nectarines and peaches "*are* marketed pursuant to detailed marketing orders that *have displaced* many aspects of independent business activity." 521 U.S. at 469 (emphasis added). Second, the Court conducted its analysis on the view that respondents in that case "agree with the central message of the speech that is generated by the generic program." *Id.* at 470; see also *id.* at 471 ("none of the generic advertising conveys any message with which respondents disagree"). While the government might now dispute the accuracy of these core elements of the *Wileman* opinion, they were nonetheless accepted by the Court and provide essential context through which to help reconcile the opinion with longstanding cases and principles.

For example, when discussing *Abood* and the germaneness test, *Wileman* noted that "compelled contributions to support activities related to collective bargaining" could survive First Amendment scrutiny. 521 U.S. at 472. And when discussing *Lenhert*, the Court noted that dissenting union members could *not* be assessed "the cost of certain publications that were not *germane to collective bargaining activities*." *Id.* at 473. Both passages recognize that the object of the germaneness analysis is some collective *activity*, not merely some abstract policy goal. And the Court's discussion of the marketing orders in *Wileman* is consistent with that view. It thus described the compelled funding of generic advertising "as part of a broader collective enterprise in which [business entities'] freedom to act independently is already constrained," and noted that the compelled assessments were "used to fund collective advertising, together with other collective activities." *Id.* at 469. In this context, the Court's statement that the generic advertising was "germane to the purposes of the marketing orders," *id.* at 473, can best be understood to mean that it was germane to the "broader collective enterprise" thought to be established by such marketing

orders.[8] Such a view is quite consistent with the germaneness test as described by *Amicus* here.

The *Wileman* opinion also seems to have viewed the absence of disagreement with the message to have been significant to its analysis. Thus, in distinguishing *Abood*, the Court stated that "[n]one of the advertising in this record promotes any particular message" other than encouraging purchase of California tree fruit. 521 U.S. at 472. It viewed the objections by respondents as primarily based upon the amount of funds and the belief that their "money is not being well spent," rather than as based upon any "disagreement with the content of the message." *Id.* On a factual record thought to show no disagreement with the compelled speech, but merely an economic concern over the expenditures in general, there is no significant tension between the result in *Wileman* and a proper construction of the *Abood* line of cases. While some might argue with the Court's view of the factual record regarding respondents' objections, that is no reason to read the opinion as if such context were irrelevant and thereby convert a fairly modest holding into a sweeping doctrinal departure.

Because there is no "collective enterprise" to which the compelled advertising in the present case is "germane," and because respondent here undoubtedly disagrees with the content, not merely the cost, of the advertising, *Wileman* does not support the speech-only marketing orders in this case.

III. GOVERNMENT ADVOCACY SHOULD RECEIVE THE SAME LEVEL OF FIRST AMENDMENT SCRUTINY AS OTHER FORMS OF COMPELLED SPEECH.

The government argues – for the first time in this case – that the generic mushroom advertisements constitute govern-

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[8] That the government now claims that the marketing orders in *Wileman* were not in fact so broad and created no collective enterprise is irrelevant to a sensible understanding of that opinion and its assumption of such breadth and collectivization.

ment speech and that the "First Amendment does not constrain the government's ability to engage in speech of its own." Pet. Br. 13. In support of this novel proposition, it relies upon *dicta* from a number of this Court's cases that it reads to imply a government right to advocate domestically in favor of its preferred programs and policies. Pet. Br. 33. Although the government's failure to assert or brief that defense below makes this case a poor choice for addressing the complex problem of government speech, if this Court nonetheless reaches the issue it should hold that both the government and the prior *dicta* are incorrect. Instead, the First Amendment test for domestic government advocacy should be the same as the test for compelled support for third-party speech.

A. The Parameters of Government Speech.

Before considering any supposed government-speech doctrine, it is necessary properly to identify what constitutes government speech, and what variety of such speech is alleged to be present in this case. Government speech comes in many forms and arises in many contexts. It may involve primarily factual speech concerning the government's own activities, such as laws enacted or the annual budget, it may involve factual speech about other persons, things, or events, such as economic data, scientific research, or weather reports, or it may involve the expression of opinions and advocacy on topics ranging from government programs, public conduct, or, as in this case, agricultural commodities.

In addition to the various types of government speech, there are various modes by which the government speaks. It may speak through its officers and agents, through administrative officials, through official publications, or through the purchase of third-party communications services. The means by which the government purports to speak may have significant ramifications for First Amendment analysis and may

sometimes mix government speech with private speech, adding further complications.[9]

Finally, the government may be acting in different capacities in any given case, with material consequences for First Amendment analysis. For example, the government may act as employer, it may act as market participant in the sale of goods and services, it may act as sovereign speaking to its own citizens, it may act as sovereign speaking to the international community, or it may act in some mixture of these roles. Just as with restrictions or prohibitions on speech, the governmental role will alter the First Amendment analysis of government speech. See *Connick* v. *Myers*, 461 U.S. 138 (1983) (speech restrictions by government as employer). And just as public employees may be compelled to support speech necessary to effectuate collective bargaining agreements with government entities, such government entities, in their role as employers, are obviously entitled to negotiate such agreements as well, and to engage in such speech as is necessary to form and implement such agreements. But recognizing the necessity and acceptability of speech in one context does not, *a fortiori*, establish the propriety of government speech in all contexts any more than permissible speech restrictions in the workplace justify like restrictions on the public at large.

The point of this extended taxonomy is simply to show that government speech is a complex and heterogeneous issue that should not be determined on the basis of broad generalities about government speech made in past *dicta* and that should not be approached lightly in a case where the issue has not even been litigated before the lower courts. And even if

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[9] Speech by individuals within government, for example the President, Senators, or Representatives, may not be "government" speech at all, but rather individual speech. When an elected official communicates with constituents or campaigns for re-election, such speech is not on behalf of the government itself, but rather on behalf of the individual office-holder. The communication that occurs by the component members of government regarding their jobs is not the type of speech at issue in this case.

the Court were to grapple with the issue now, it should focus carefully upon the particular type of government speech allegedly at issue, without attempting to rule for other forms of government speech and without giving undue deference to the speech here out of concern for speech in some other circumstance that may well raise different concerns. The government's reliance on undifferentiated statements of support for government speech thus is overly simplistic and has a tendency to wash over material distinctions within the menagerie of government speech.

In this case, even assuming *arguendo* that the mushroom advertising involves government speech at all, the Court would be addressing government advocacy through the use of a targeted tax to coerce resources from a limited segment of the public to fund a message not expressly attributed to the government and targeted at the general citizenry in order to change their views in a manner favored by the government. This case thus does *not* involve speech or advocacy by individual officials within the government or by the government as market participant, but rather a diversion of supposedly public resources obtained through the coercive power of government in its role as regulator and sovereign.[10] Furthermore, the issue in this case at best involves government advocacy and persuasion, and not the very different issue of government publication of information.[11] As presented in this case,

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[10] As a simple example, if Congress were to appropriate a million dollars to buy a television advertisement saying "Please support the expansion of NAFTA" or "Please support air strikes against Iraq," that would be government advocacy. By contrast, if individual Senators or Congressmen were to hold a press conference and announce their support for NAFTA or Iraqi air strikes, that would not be government speech notwithstanding that the speakers are government officials.

[11] In many instances the government is required to provide information to the public, for example, the publication of any new laws it has passed. Similarly, publication of economic data raises different questions from attempts to persuade the public to a particular viewpoint. While the line between information and advocacy may sometimes blur, this case presents

therefore, the question is simply whether the government *qua* government may use its power to divert resources into viewpoint-specific advocacy that seeks to alter public opinion in a direction preferred by the government.

B. Creeping *Dicta* and the Need for Caution in Creating a Government Speech Doctrine.

The government relies on several cases for its claim that where the government is the speaker "the First Amendment is not implicated." Pet. Br. 13. In each of those cases, however, the issue of government speech was irrelevant to the holding and hence any incidental commentary regarding government speech was entirely *dicta*. In *Board of Regents of the University of Wisconsin System* v. *Southworth*, for example, the University expressly disavowed any government-speech defense, leading this Court to state that the "University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." 529 U.S. 217, 229 (2000). Any commentary on the government's purported right to advocate its policies was admittedly unnecessary to the decision and thus classic *dicta*.

In *Rosenberger* v. *Rector & Visitors of the University of Virginia*, this Court squarely rejected the notion that the University itself was speaking or subsidizing its own preferred message and instead held that the University was "expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S. 819, 834 (1995). Once again, commentary concerning what rules might apply to government speech was unnecessary to the decision and advisory.[12]

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a clear issue of government advocacy – literally "promotion" – intended to change public views of and desire for mushrooms.

[12] The government's citation to a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment), is

Finally, this Court's recent decision in *Legal Services Corporation* v. *Velazquez*, No. 99-603 (Feb. 28, 2001), repeats much of the *dicta* from *Southworth* and *Rosenberger*, but notes that the legal services program at issue "was designed to facilitate private speech, not to promote a governmental message," slip op. at 7, thus making such discussion *dicta* as well.

The essential point here is that this Court has never *held* that government speech is immune from First Amendment scrutiny, much less defined the remarkably complex parameters of government speech or the standards by which it should be evaluated. While there is admittedly a good deal of *dicta* opining on the topic, *Amicus* respectfully suggests that such opinions formed without benefit of a genuine adversarial clash ought to be viewed with skepticism, particularly where there is ample room to dispute the reasoning of the *dicta* in question, as will be discussed in the following section.

C. The False Equation of Government Speech with Government Conduct.

The government places primary reliance upon a passage from *Southworth* purportedly stating that the government is entitled to engage in " 'speech and other expression to advocate and defend its own policies.' " Pet. Br. 33 (quoting 529 U.S. at 229). The government's redacted passage from *Southworth* is, of course, *dicta* and the unredacted version is decidedly less conclusive regarding any supposed government speech rights:

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self-evidently non-authoritative, as are its citations to the concurring commentary in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring in the judgment), and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment), and to the Court of Appeals decision by then-Judge Scalia in *Block* v. *Meese*, 793 F.2d 1303, 1313 (CADC) (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986). Pet. Br. 33-34, 40, 43-44.

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. See, e.g., *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548-549 (1983).

529 U.S. at 229.[13] But noting that it "seems" inevitable for the government to speak in support of its substantive programs does not mean that every instance of government speech is inevitable or acceptable even then. Furthermore, even *Southworth*'s more restrained suggestion of a potential government-speech doctrine turns on a mistaken parallel between government conduct and government advocacy. The error in that *dicta* is the same one discussed in the context of compelled support for third-party speech and it is wrong for the same reasons. While the government may certainly adopt controversial policies opposed by a current minority, it is highly doubtful whether the government may properly tilt the marketplace of ideas to ensure continued public support for its programs or to counter a current minority's efforts to change public opinion. Government's role is to obey the

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[13] This passage does not claim that government speech is immune from First Amendment scrutiny, as the government now claims, but rather notes that it is an unresolved "question" whether political checks alone are "sufficient to overcome First Amendment objections" to viewpoint-discriminatory university speech. If anything, the passage seems to recognize that the First Amendment at a minimum *applies* to such government speech and leaves open how the First Amendment might be satisfied.

changing popular will, not to play rearguard to give permanence to a temporal majority viewpoint.[14]

In the end, there is a substantial constitutional equivalence between many types of government speech and government coercion of support for third-party speech. Both raise concerns of government manipulation of the marketplace of ideas, viewpoint discrimination, and compelled support for objectionable advocacy. As Justice Scalia has observed regarding viewpoint discrimination in government *support* for third-party speech, to instead have speech "directly involving the government itself in viewpoint discrimination (if it is unconstitutional) would make the situation even worse." *Finley*, 524 U.S. at 598 (concurring in the judgment). While Justice Scalia would allow viewpoint discrimination in *both* circumstances, this Court has imposed significant First Amendment limits on such discrimination in the subsidies and compelled support contexts and should do likewise in the government speech context.[15]

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[14] The notion that it is "the very business of government to favor and disfavor points of view," *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment), is correct insofar as favored views are implemented through regulation of conduct rather than speech. But it is surely *not* the business of government to attempt to shape the public's views (or worse yet, entrench a currently fashionable view) rather than respond to such views while leaving them to evolve without governmental manipulation.

[15] Justice Powell's unsupported observation in his separate opinion in *Abood* that "[c]ompelled support of a private association is fundamentally different from compelled support of government," 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment), seems plainly incorrect in the context of non-expressive activities. While there perhaps ought to be some difference, *Amicus* is unaware of cases imposing a greater burden on government accomplishing a particular action directly or through the use of and payment to third parties. While third parties receiving funding for controversial conduct may be "representative of only one segment of the population," *id.*, the decision to fund the non-speech activities of such parties is still made by the government just as much as if the government used its own agents to conduct the same activities. Furthermore, even if support for compelled *activity* by private organizations were more suspect

One of the most telling arguments in favor of First Amendment limits on government speech comes indirectly from Justice Scalia himself, who allows that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party," though he does denies that such "unconstitutionality has anything to do with the First Amendment." *Finley*, 524 U.S. at 598 n.3 (concurring in the judgment). But no other source of unconstitutionality is readily apparent. And other Justices of this Court who have recognized constitutional difficulties with such openly partisan government speech have expressly identified the First Amendment as the source of those difficulties. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (quoting the First Amendment and then stating: "Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands."); *Lathrop*, 367 U.S. at 853 (Harlan, J., concurring in the judgment) (agreeing that neither a state nor the federal government could " 'create a fund to be used in helping certain po-

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than compelled support for direct government activity, the First Amendment inverts such suspicions in the context of expressive activity and association and government involvement in expressive choices makes matters worse, not better.

litical parties or groups favored' by it 'to elect their candidates or promote their controversial causes' " (quoting *Street* dissent)).[16]

One staple of the purported government-speech doctrine is the citation to *Rust* v. *Sullivan*. See. e.g., *Southworth*, 529 U.S. at 229; *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment). In *Rust*, however, the issue of government speech was not necessary to the decision. Indeed, this Court has recently recognized that *Rust* did not rely upon a claim that the government-financed medical activities at issue constituted government speech. *Velazquez*, slip op. at 6; see also *id*. (Scalia, J., dissenting), slip op. at 6 (noting that the speaker in *Rust* was not the government). *Rust*'s observation about the government's ability to choose "to fund one activity to the exclusion of" another, 500 U.S. at 193, seems to view the activity in question as conduct, and does not address the different issues raised by the viewpoint-discriminatory funding of speech. As noted previously, however, speech is different.

Another common argument in favor of a government speech doctrine is to cite the National Endowment for Democracy as evidence of the government's authority to engage in viewpoint discriminatory speech. This Court in *Rust,* for example, assumed that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; see also *Finley*,

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[16] That the example involves political speech rather than commercial speech carries no dispositive weight given that the First Amendment protects both, albeit to a greater or lesser degree. *Amicus*'s point is merely that compelled support for speech – whether such speech is made by the government or by third parties selected by the government – should be subject to the same scrutiny as restrictions on like speech. The degree of scrutiny may vary with the type of speech at issue, but the initial applicability of the First Amendment remains constant throughout.

524 U.S. 597 (Scalia, J., concurring in the judgment) (citing *Rust*); cf. *Lathrop*, 367 U.S. at 857 (Harlan, J., concurring in the judgment) (speculating on propriety of using tax funds for United States Information Agency propaganda that might offend some taxpayers).

But pro-democracy propaganda directed at other countries is readily distinguishable from propaganda aimed at a domestic audience. Outward-directed propaganda serves far more legitimate national interests and raises far fewer concerns than does inward-directed propaganda. Furthermore, speech promoting basic constitutional structures even in the United States might conceivably overcome the relevant First Amendment scrutiny depending upon the nature of the speech and the supposed benefits to be achieved from such speech. Were such domestic advocacy to take on a partisan slant, however, there would be grave doubt regarding its constitutionality, regardless of whether the United States may use advocacy to promote a partisan agenda abroad.

In a similar vein, course selection at public universities may pose a unique situation requiring somewhat different analysis than government advocacy to the public at large. Both *Southworth* and *Rosenberger* appear to have been moved to comment on government speech in order to dispel any implication that public universities might somehow be constrained in selecting their offerings or that academics might somehow be forced to offer viewpoint-neutral courses. That concern is legitimate, but does not support a government speech doctrine untethered to the unique concerns of the university environment, and may not be sufficient in any event to overcome First Amendment objections. But a public university's potential claims to being a market participant in the educational context, its traditions of academic freedom and independence, and the ready choice among a variety of schools within the public system offer no support for the type of government advocacy at issue in this case, which shares none of those potentially distinguishing features.

Finally, this case does not raise the same practical issues as when government acts in a proprietary manner as a consumer of, for example, art to put up in its own buildings, where it might sensibly be given greater leeway than if it were purchasing art to inculcate a particular viewpoint among the public. Likewise, when the government is selling some product – surplus typewriters or confiscated vehicles perhaps – the First Amendment would pose little obstacle to its advertising just as any other seller would. Such speech would be incidental to the accomplishment of permissible government conduct and is fairly necessary to such conduct.[17]

Regardless of whether there are sufficient political checks on other forms of conduct by the government, First Amendment protection of the freedom of speech is not subservient to such political processes:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. If political checks are inadequate to replace the First Amendment where the government chooses to compel a dissenting minority to support third-party speech, there is no reason why such checks suffice when the government avoids the middleman and coerces minority support for the same speech out of the government's mouth. In

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[17] Indeed, if the government actually did collectivize the industry and itself purchased all mushrooms for resale then promotional advertising incidental to the government's sale of such goods would likely be acceptable if the underlying collectivization were valid.

both instances the First Amendment should provide the same protection and the same heightened scrutiny.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be affirmed.

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Dated: March 8, 2001.